

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JEFF POKORNY, LARRY BLENN, and) Case No. 07-cv-0201-SC
KENNETH BUSIERE, on behalf of)
themselves and those similarly) ORDER APPOINTING SPECIAL
situated,) MASTER
)
Plaintiffs,)
)
v.)
)
QUIXTAR INC., et al.,)
)
Defendants.)
_____)

I. SCOPE OF ORDER

1. Order Applicable to All Related Cases. This Order is binding on all parties and their counsel in the instant case and in any cases subsequently made part of these proceedings, and shall govern each case in the proceedings unless the Court states by further Order that this Order relates only to specific cases.

2. Appointment of Special Master. Pursuant to Federal Rule of Civil Procedure 53, the Court's Order of November 30, 2012 (ECF No. 246 ("Nov. 30 Order")) and section 6.1.2 of the parties' Amended Settlement Agreement (ECF No. 162-2 ("ASA")), and with the consent of the parties, the Court hereby appoints the Honorable James Larson, United States Magistrate Judge (Retired), of JAMS, as

1 a Special Master to assist the Court in this litigation
2 (hereinafter "Special Master").
3

4 **II. BASIS FOR APPOINTMENT UNDER RULES 53(a) AND 53(b)(1)**

5 3. Basis for Appointment. The Special Master is hereby
6 appointed pursuant to Rule 53(a)(1) to perform duties consented to
7 by the parties (Rule 53(a)(1)(A)), to make findings of fact on
8 issues to be decided by the Court because appointment is warranted
9 by an exceptional condition, namely, the volume of special hardship
10 claims requiring evaluation (Rule 53(a)(1)(B)(i)).

11 4. No Grounds for Disqualification. Pursuant to Rule
12 53(a)(2) and 53(b)(3), the Special Master shall file an affidavit
13 with this Court that states that he has no relationship to the
14 parties, counsel, action, or Court that would require
15 disqualification of a judge under 28 U.S.C. § 455. During the
16 course of these proceedings, the Special Master and the parties
17 shall notify this Court immediately if they become aware of any
18 potential grounds that would require disqualification.

19 5. Fairness Considerations. Pursuant to Rule 53(a)(3), the
20 Court has considered the fairness of imposing the likely expenses
21 of the Special Master on the parties. The Court believes that the
22 appointment and use of the Special Master will materially advance
23 the litigation, thereby achieving considerable cost-savings to all
24 parties. Moreover, the Court notes that the parties' ASA
25 specifically contemplates appointment of a Special Master, that the
26 parties have consented to the Special Master's appointment, and
27 that they have agreed to arrange the Special Master's compensation,
28 as discussed in paragraph 13 herein. The Court will protect

1 against unreasonable expenses and delay through regular
2 communication with the Special Master.

3 6. Proper Notice Given to All Parties. Pursuant to Rule
4 53(b)(1), the Court, in its November 30 Order, gave the parties
5 notice of its intent to appoint the Special Master and an
6 opportunity to be heard with respect to such appointment before
7 issuing this Order.

8
9 **III. SPECIAL MASTER'S DUTIES, AUTHORITY, AND COMPENSATION**

10 7. Diligence. Pursuant to Rule 53(b)(2), the Court hereby
11 directs the Special Master to proceed with all reasonable diligence
12 in performing his duties.

13 8. Scope of Special Master's Duties. Pursuant to Rule
14 53(b)(2)(A), the Special Master shall assist the Court with matters
15 such as: determining whether a particular person is covered by an
16 arbitration agreement; if so, determining which arbitration
17 agreement applies; determining whether the terms of the arbitration
18 agreement are enforceable; determining where and before whom
19 arbitration shall occur, if at all; determining the order in which
20 cases shall be arbitrated; resolving motions now pending before
21 this Court, as well as future motions; determining any issue of law
22 or fact necessary to discharging the foregoing duties, subject to
23 review as provided in paragraphs 15 through 19; and other matters
24 in which the Court wishes to utilize his services.

25 9. Scope of Special Master's Authority. The Special Master
26 shall have the authority provided in Rule 53(c) and 53(d).

27 10. Procedure for Motions Submitted to Special Master.
28 Motion practice before the Special Master, if any, shall be

1 conducted pursuant to the Local Rules and General Orders of this
2 Court. The Special Master may, in his discretion, issue other
3 orders governing procedures for motion practice. The parties shall
4 provide to the Special Master three sets of all motion papers he is
5 to consider, directing the papers to his attention at: JAMS, Two
6 Embarcadero Center, Suite 1500, San Francisco, California.

7 11. Ex Parte Communications. Pursuant to Rule 53(b)(2)(B),
8 the Special Master may communicate ex parte with the Court at any
9 time, without providing notice to the parties. The Special Master
10 may communicate ex parte with any party or its counsel, as the
11 Special Master deems appropriate, for the purposes of ensuring the
12 efficient administration and management of this litigation,
13 including the making of informal suggestions to the parties to
14 facilitate compliance with Orders of this Court. Such ex parte
15 communications shall not, however, address the merits of any
16 substantive issue, except that, if the parties seek assistance from
17 the Special Master in resolving a dispute regarding a substantive
18 issue, the Special Master may engage in ex parte communications
19 with a party or counsel regarding the merits of the particular
20 dispute, for the purpose of mediating or negotiating a resolution
21 of that dispute, but only with the prior permission of those
22 opposing counsel who are pertinent to the particular dispute.

23 12. Preservation of Materials and Preparation of Record.
24 Pursuant to Rule 53(b)(2)(C), the Special Master shall maintain
25 orderly files consisting of all documents submitted to him by the
26 parties and any of his written orders, findings, and/or
27 recommendations. Pursuant to Rule 53(e), the Special Master shall
28 file any written orders, findings, and/or recommendations with the

1 Court via the Court's Electronic Case Filing system ("ECF"),
2 consistent with Civil Local Rule 5-4 and General Order 45. Such
3 filing shall fulfill the Special Master's duty to serve his order
4 on the parties. Any records of the Special Master's activities
5 other than his written orders, findings, and/or recommendations
6 shall be filed in accordance with paragraph 17 herein.

7 13. Compensation. Pursuant to Rule 53(b)(2)(E) and 53(g),
8 the parties shall confer with the Special Master to set his rates
9 and the proportion of his fees and expenses that each party shall
10 bear. The Special Master may hire or employ, at a reasonable rate,
11 other personnel to assist in completion of the duties set forth in
12 this Order, and the Special Master shall be reimbursed for payments
13 made to such personnel as part of his expenses. The Special Master
14 shall prepare a monthly invoice for his fees and expenses, which he
15 shall provide to counsel. Such invoices shall be paid promptly.

16 14. Special Master's Reports to Court. Pursuant to Rule
17 53(f), the Special Master shall report to the Court as directed by
18 the Court.

19
20 **IV. ACTION ON SPECIAL MASTER'S ORDERS, REPORTS, OR RECOMMENDATIONS**

21 15. Scope of Section. Pursuant to Rules 53(b)(2)(D) and
22 53(g), the procedures described in paragraphs 16 through 19 herein
23 shall govern any action on the Special Master's orders, reports,
24 and/or recommendations.

25 16. Time Limits for Review. Time shall be computed in
26 accordance with Federal Rule of Civil Procedure 6(a). Any party
27 wishing to file objections to or a motion to adopt or modify the
28 Special Master's orders, reports, and/or recommendations must file

1 such objections or motion with the Court within fourteen (14) days
2 from the day the Special Master filed the order, report, and/or
3 recommendation via ECF. If any party files an objection or motion,
4 the opposing party shall have seven (7) days to respond, and the
5 moving/objecting party shall have seven (7) days to reply. In case
6 of objection, the Special Master's order shall remain in effect
7 until the Court rules on the objection.

8 17. Filing the Record for Review. The party filing the
9 objection or motion shall submit with such objection or motion any
10 record necessary for the Court to review the Special Master's
11 order, report, and/or recommendation, including any transcripts of
12 proceedings before the Special Master and any documents submitted
13 by the parties in connection with the Special Master's order,
14 report, and/or recommendation. Failure to provide the record shall
15 constitute grounds for the Court to overrule the objection or deny
16 the motion.

17 18. Standard for Court's Review. Pursuant to Rule 53(f)(3),
18 in the absence of a stipulation to a higher standard (see ECF No.
19 248), the Court shall review de novo any findings of fact made or
20 recommended by the Special Master. The Court shall review de novo
21 any conclusions of law made or recommended by the Special Master.
22 The Court will set aside the Special Master's ruling on a
23 procedural matter only for an abuse of discretion.

24 19. Court's Actions on Special Master's Orders. Pursuant to
25 Rule 53(g)(1), in acting on an order, report, or recommendation of
26 the Special Master, the Court shall afford each party an
27 opportunity to be heard and, in its discretion, may receive
28 evidence, and may adopt or affirm; modify; wholly or partly reject

1 or reverse; resubmit to the Special Master with instructions; or
2 make any further orders it deems appropriate.

3
4 IT IS SO ORDERED.

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6 Dated: December 27, 2012


UNITED STATES DISTRICT JUDGE